

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(b)(1)'s "Operate Independently")	WC Docket No. 03-228
Requirement for Section 272 Affiliates)	
_____)	

**COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),¹ through the undersigned and pursuant to the *Public Notice*² released by the Federal Communications Commission (FCC or Commission) and pursuant to sections 1.415 and 1.419 of the Commission's rules,³ hereby submits its comments in response to Commission's Notice of Proposed Rulemaking (NPRM) in the above-referenced proceeding.⁴ In the NPRM, the Commission seeks comment on whether the operating, installation, and maintenance (OIM) sharing prohibition is an overbroad means of preventing cost misallocation or discrimination by Bell operating companies (BOCs) against unaffiliated rivals; more specifically, whether the Commission should modify or eliminate its rules implementing the "operate independently" requirement (OIM Rules) of Section 272(b)(1) of the Telecommunications Act of 1996 (Act); whether the prohibition and rules against joint

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² *Public Notice*, WC Docket No. 03-228, DA 03-3742 (rel. Nov. 21, 2003) soliciting comment on Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates.

³ 47 C.F.R. §§1.415 and 1.419.

⁴ *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, FCC 03-272, Notice of Proposed Rulemaking (rel. Nov. 4, 2003) (NPRM or OIM NPRM).

ownership by BOCs and their Section 272 affiliates of switching and transmission facilities, or the land and buildings on which such facilities are located (Joint Facilities Rules), should be modified or eliminated; and how a conclusion by the Commission to eliminate both the joint facilities ownership restriction and the OIM sharing prohibition would relate to the Commission's conclusion in the *Non-Accounting Safeguards Order*⁵ that the "operate independently" language of Section 272(b)(1) imposes separate and independent requirements on Section 272 separate affiliates beyond those detailed in Section 272(b)(2)-(5).⁶ The Commission issued the NPRM concurrently with its Memorandum Opinion and Order,⁷ in which the Commission denied Verizon's Petition for Forbearance⁸ regarding compliance with the Commission's OIM rules. While USTA disagrees with the basis of the Commission's denial of the Verizon Petition,⁹ USTA addresses below the substance of the requests in the NPRM.

⁵ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*).

⁶ See NPRM, ¶¶ 1, 6, and 10.

⁷ *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, FCC 03-271, Memorandum Opinion and Order (rel. Nov. 4, 2003) (Memorandum Opinion and Order).

⁸ *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149 (filed Aug. 5, 2002) (Verizon Petition).

⁹ In reply comments filed by USTA in response to the Verizon Petition, USTA maintained that the forbearance Verizon sought was not subject to Section 10(d) of the Act, which states that the "Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." See *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2) of the Commission's Rules*, Reply Comments of the United States Telecom Association, CC Docket No. 96-149 (Sept. 24, 2002) (USTA Reply Comments) at 4; see also 47 U.S.C. §160(d). USTA

DISCUSSION

USTA urges the Commission to eliminate its OIM Rules because they are not necessary to prevent discrimination or cost misallocation by BOCs against unaffiliated rivals. The OIM Rules are not necessary to prevent discrimination because there are numerous other sections of the Act that guard against discrimination in charges, practices, classifications, or regulations. Until BOCs' separate affiliate obligations sunset, the structural and transactional requirements of Sections 272(b)(2)-(5) continue to apply. After sunset of the BOCs' separate affiliate obligations, BOCs are still obligated to comply with the cost accounting rules and imputation standards of Section 272(e)(3). Beyond these obligations, BOCs remain bound by the non-discrimination provisions of Sections 202 and 251. The OIM Rules are not necessary to prevent cost misallocation because BOCs operate under a price-cap regime, and thus have no ability to manipulate prices by inserting costs in an attempt to engage in cross subsidization. Rather, their prices are set by formula. Any changes to those prices, such as inclusion of exogenous costs, must be approved by the Commission.

USTA also urges the Commission to eliminate its OIM Rules because they hinder competition. These rules cause BOCs to incur duplicative costs because their long distance affiliates must replicate personnel to handle provisioning, maintenance, and repair work that could be handled more efficiently by the BOCs' local exchange carrier (LEC) employees. In addition, BOCs incur duplicative costs to develop and operate separate operating support

explained in these reply comments that "Congress could have limited the Commission's ability to forbear from the requirements of Section 272 by including Section 272 in the limitations of Section 10(d), but it did not. The Commission's decision of whether or not to forbear from requiring the OIM rules, which it interpreted as being necessary pursuant to Section 272(b), should not made pursuant to the limitations of Section 10(d), rather it should be based on the requirements of Section 10(a)." USTA Reply Comments at 4.

systems, network operating control systems, and back office provisioning functions for their long distance affiliates when the work of those systems and functions could be performed more efficiently by the BOCs' LEC systems and functions. Duplicative costs such as these result in higher costs that consumers must pay because the BOCs have been forced to operate their network and resources inefficiently. Moreover, customers that obtain both local and long distance services from BOCs are likely to receive less efficient and less responsive customer service because the BOCs cannot offer integrated customer service. The BOCs must deploy different service teams to respond to different aspects of their customers' needs and problems when what the customers really need is integrated service and solutions. Importantly, BOCs' competitors are not required to operate in such inefficient ways. Their large competitors offer integrated, end-to-end local and long distance services over their own facilities and/or over facilities they lease. Yet, unlike BOCs and their long distance affiliates, these large wireline competitors are only limited in their ability to offer seamless, integrated local and long distance services by their ability to win customers for both of those services. More importantly, the BOCs' wireless competitors are not even faced with the hurdle of acquiring a customer for both local and long distance services because customers of a wireless provider must take that provider's local and long distance services. In today's competitive market for these integrated services, there is no reason why the BOCs should be limited in offering such integrated services.

For the same reasons USTA cites for elimination of the OIM Rules, USTA also urges the Commission to eliminate its Joint Facilities Rules. They are not necessary to prevent discrimination or cost misallocation by BOCs against unaffiliated rivals and they hinder competition.

Finally, the Commission asks how a conclusion by it to eliminate both the joint facilities ownership restriction and the OIM sharing prohibition would relate to its conclusion in the *Non-Accounting Safeguards Order* that the “operate independently” language of Section 272(b)(1) imposes separate and independent requirements on Section 272 separate affiliates beyond those detailed in Section 272(b)(2)-(5). USTA notes that although the Commission associates the OIM Rules and the Joint Facilities Rules with the “operate independently” requirement of Section 272(b)(1), the Act did not compel the Commission to develop and impose any of these rules. Moreover, the Act did not identify any limitations on sharing of OIM functions or joint ownership of transmission and switching facilities between BOCs and their affiliates. Yet, Congress certainly knew how to include such limitations in statutory language because it did so in Section 274(b) of the Act.¹⁰ Section 274(b)(7) specifically prohibits BOCs from “hiring or training of personnel on behalf of a separated affiliate” and prohibits BOCs from “purchasing, installation, or maintenance of equipment on behalf of a separated affiliate.”¹¹ Had Congress intended to prohibit the sharing of OIM functions or the joint ownership of transmission and switching facilities by BOCs and their Section 272 affiliates, it would have expressly stated so in Section 272 as it did in Section 274. Despite the fact that the Commission found in the *Non-Accounting Safeguards Order* that the “Act does not elaborate on the meaning of the phrase ‘operate independently,’”¹² the Commission chose to interpret that phrase to prohibit BOCs from sharing operation, installation, and maintenance functions and to prohibit them from jointly

¹⁰ Section 274(b) sets forth the structural and transactional requirements for the relationship between BOCs and their electronic publishing affiliates regarding the provision of electronic publishing by these affiliated companies.

¹¹ See 47 U.S.C. §274(b)(7).

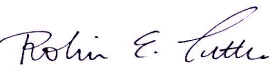
¹² *Implementation of the Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21976 (1996).

owning transmission and switching facilities with their Section 272 affiliates.¹³ This interpretation did not appropriately take into consideration the protections against discrimination that already existed in Sections 272(b)(2)-(5), as well as the protections against discrimination in Sections 202, 251, and 272(e)(3), which will remain after the sunset of the BOCs' separate affiliate obligations, and thus the true necessity for the OIM Rules or the Joint Facilities Rules. USTA maintains that the Commission's justification for implementing these rules was vague and insufficiently supported. Accordingly, USTA believes that the Commission should have no difficulty determining that the OIM Rules and Joint Facilities Rules should be eliminated, despite its previous conclusion in the *Non-Accounting Safeguards Order*.

For the reasons stated above, USTA urges the Commission to eliminate its OIM Rules and Joint Facilities Rules.

Respectfully submitted,

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¹³ *Id.* at 21982.

CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on December 10, 2003, these Comments of The United States Telecom Association were electronically filed with the FCC through its Electronic Comment Filing System and were electronically delivered to the service list below.

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